A **KEJORA AMAN SDN BHD v. HMS CORPORATION SDN BHD**

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
TENGKU MAIMUN TUAN MAT JCA
BADARIAH SAHAMID JCA
B [CIVIL APPEAL NO: W-02(IM)(NCVC)-1869-11-2014]
18 MARCH 2016

CIVIL PROCEDURE: *Appeal – Notice of appeal – Appeal against three enclosures that were heard and disposed of together in High Court – Whether three separate* C *appeals must be filed – Whether notice of appeal defective – Whether caused prejudice to other party – Whether there was ambiguity – Whether notice of appeal misleading – Whether an irregularity – Rules of Court 2012, O. 2 r. 1(1)*

The appellant ('the defendant'), the main contractor of a construction project, D had appointed the respondent ('the plaintiff') as the subcontractor to carry out a portion of the project works. The plaintiff completed the works and the certificate of practical completion was issued and the final value was ascertained and confirmed. According to the plaintiff, even though the initial contract sum was RM10,900,000, the amount was increased to a final contract sum of RM11,409,105.24 following several variation orders. The E defendant had paid RM9,676,539.23 to the plaintiff, leaving a balance of RM1,732,566 ('the balance sum'). Despite several demands by the plaintiff, the defendant neglected or refused to pay. This prompted the plaintiff to file an action at the High Court, claiming for the balance sum. The defendant contested the plaintiff's claim and filed his defence, containing allegations F against the plaintiff. In denying the defendant's allegations, the plaintiff filed encls. 13 and 15 to strike out the defendant's defence and for leave to sign final judgment summarily against the defendant. The defendant filed encl. 39 to strike out encls. 13 and 15, but was dismissed. Hence, the present appeal by the defendant. The plaintiff raised a preliminary objection that the notice G of appeal was defective as the defendant had only filed one notice of appeal against three decisions by the Judicial Commissioner ('the JC').

Held (dismissing appeal with costs)
Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

H **(1)** The preliminary objection ought to be dismissed. The non-compliance with the rules was only a technical non-compliance which did not cause prejudice to the plaintiff. The three enclosures were heard together and disposed of at the same time by the JC. Moreover, in the notice of appeal, the defendant had clearly specified which and what decision was being appealed against. There was no ambiguity and the plaintiff was not I misled. Under O. 2 r. 1(1) of the Rules of Court 2012, the effect of non-compliance is only an irregularity and shall not nullify the proceedings, any steps taken in the proceedings or any document, judgment or order therein. (para 14)

(2) There was no merit in this appeal. There was no triable issue. The appeal was dismissed with costs. (para 23)

Bahasa Malaysia *Headnotes*

Perayu ('defendan'), kontraktor utama satu projek pembangunan, melantik responden ('plaintif') sebagai subkontraktor untuk menjalankan sebahagian kerja-kerja projek. Plaintif telah menyempurnakan kerja-kerja tersebut dan sijil pelengkapan praktikal dan nilai akhir dipastikan dan disahkan. Menurut plaintif, walaupun jumlah asal kontrak adalah RM10,900,000, jumlah tersebut dinaikkan kepada jumlah akhir kontrak iaitu RM11,409,105.24 berikutan beberapa perintah variasi. Defendan membayar RM9,676,539.23 kepada plaintif, berbaki sebanyak RM1,732,566 ('jumlah baki'). Walaupun dituntut beberapa kali oleh plaintif, defendan cuai atau enggan membayar. Ini menyebabkan plaintif memfailkan satu tindakan di Mahkamah Tinggi untuk menuntut jumlah baki. Defendan mempertikaikan dan memfailkan pembelaannya yang mengandungi dakwaan-dakwaan terhadap plaintif. Dalam menafikan dakwaan-dakwaan defendan, plaintif memfailkan lampiran 13 dan 15 untuk membatalkan pembelaan defendan dan bagi kebenaran untuk menandatangani penghakiman ringkas akhir terhadap defendan. Defendan memfailkan lampiran 39 untuk membatalkan lampiran 13 dan 15, tetapi ditolak. Oleh itu, timbul rayuan ini oleh defendan. Plaintif membangkitkan bantahan awalan bahawa notis rayuan cacat kerana defendan hanya memfailkan satu notis rayuan sahaja terhadap tiga keputusan Pesuruhjaya Kehakiman ('PK').

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Bantahan awalan wajar ditolak. Ketakpatuhan pada kaedah-kaedah hanya satu ketakpatuhan teknikal yang tidak memprejudis plaintif. Ketiga-tiga lampiran didengar bersekali dan dibatalkan pada masa yang sama oleh PK. Tambahan pula, dalam notis rayuan, defendan telah menyatakan secara jelas apa dan yang mana keputusan yang dirayu. Tiada kesamaran dan plaintif tidak tersalah arah. Di bawah A. 2 k. 1(1) Kaedah-Kaedah Mahkamah 2012, kesan ketakpatuhan cumalah ketakaturan dan tidak membatalkan prosiding, langkah-langkah yang diambil dalam prosiding atau apa-apa dokumen, penghakiman atau perintah yang terkandung dalamnya.

(2) Tiada merit dalam rayuan ini. Tiada isu yang boleh dibicarakan. Rayuan ditolak dengan kos.

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Krishnamurthy Nagaratnam & Anor v. The Malayan Finance Corp Bhd [1986] 1 CLJ 541; [1986] CLJ (Rep) 170 SC ***(refd)***

A *Tong Soon Tiong & Ors v. FA Securities Sdn Bhd [2013] 2 CLJ 448 FC* ***(refd)***
Voo Min En & Ors v. Leong Chung Fatt [1982] 1 LNS 47 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 2 rr. 1(2), 3, O. 14, O. 18 r. 19, O. 55 r. 3(1), O. 92 r. 4
B Rules of the Court of Appeal 1994, r. 17

For the appellant - Praya Singh; M/s Andrew Paul & Assocs
For the respondent - Irwin Lo Chi Vui; M/s Lo Chambers

[Editor's note: Appeal from High Court, Kuala Lumpur; Summons No: 22NCVC-652-11-2013 (affirmed).]

C

Reported by Najib Tamby

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

D

[1] This is the defendant's appeal against the decision of Vazeer Alam Mydin Meera, Judicial Commissioner (JC) given on 10 October 2014 allowing the plaintiff's application (encl. 13) to strike out the defendant's defence and counterclaim under O. 18 r. 19 of the Rules of Court 2012 (ROC) and the plaintiff's application (encl. 15) to enter summary judgment
E against the defendant under O. 14 ROC of the 2012 and at the same time dismissed the defendant's application (encl. 39) to strike out both applications by the plaintiff pursuant to O. 92 r. 4 of the ROC 2012.

[2] At this juncture it is pertinent to note that the appellant filed only one
F notice of appeal in relation to the learned JC's decision in respect of the three enclosures. We will address this a bit more later because the respondent has raised a preliminary objection to the appellant's notice of appeal. For now we will state briefly the background facts.

[3] The defendant was appointed as the main contractor by the
G Government of Malaysia in respect of a construction project known as "Cadangan Pembangunan Projek Pendidikan Bagi Sekolah Kebangsaan Darulaman Height Yang Mengandungi 30 Bilik Darjah Dan Kemudahan Berkaitan Di Atas Sebahagian Lot 2850 Mukim Pelubang Daerah Kubang Pasu, Kedah Darul Aman" ("the project").

H **[4]** Pursuant to a letter of award dated 13 August 2009 (LOA) the plaintiff was appointed by the defendant as the subcontractor for the project to carry out a portion of the project works more particularly identified in the LOA ("the works") described as 'the construction, completion and testing & commissioning of four main blocks, one block of kantin, one block of
I pre-school, part of external works and other associated works'.

[5] One of the terms of the LOA is that payment to the plaintiff shall be on a back to back basis and in this regard the parties had agreed that all payment from the employer in respect of the works shall be paid into a designated joint bank account from which monies due to the plaintiff shall be paid out pursuant to an irrevocable instruction given to the bank by the defendant.

[6] The plaintiff completed the works and the certificate of practical completion (CPC) was issued on 26 May 2011 and the final value of the works was ascertained and confirmed by issuance of the final certificate of payment on 30 September 2011, signed by the defendant's Managing Director.

[7] The plaintiff's case is that the initial contract sum under the LOA was RM10,900,000. However the amount was increased to a final contract sum of RM11,409,105.24 following several variation orders valued at RM509,105.24.

[8] It is not disputed that the defendant has to date paid the sum of RM9,676,539.23 to the plaintiff, thus leaving a balance of RM1,732,566.01. Despite several demands by the plaintiff for the balance sum of the total contract price, the defendant neglected or refused to pay. Therefore the plaintiff filed the action to claim the outstanding balance sum of the contract price of RM1,732,566.01 together with interest and costs.

[9] The defendant contested the plaintiff's claim and contended in the statement of defence that: (i) the certificate of payment was not properly certified by the defendant; (ii) the variation works were not approved by the defendant; (iii) by way of counterclaim and set off, the defendant contended that the plaintiff had delayed in completing the works and the works were defective which required rectification by the defendant at the defendant's own cost; (iv) loss of profits as a result of not being able to obtain further contracts since 2010; and (v) loss of reputation.

[10] The plaintiff denies all the defendant's allegations and filed encls. 13 and 15 to strike out the defendant's defence and for leave to sign final judgment summarily against the defendant.

[11] In the midst of case management of these two enclosures, the defendant filed encl. 39 to strike out the plaintiff's applications in encls. 13 and 15 primarily on the ground that the affidavits in support of the two enclosures were deposed by a bankrupt and therefore had no legal capacity to affirm the affidavits without the sanction of the official receiver.

[12] With regard to the notice of appeal by the appellant/defendant, the respondent/plaintiff has raised a preliminary objection that the notice of appeal is defective because the appellant filed only one notice of appeal to appeal against three decisions by the learned JC.

Our Decision

[13] First, the preliminary objection by the plaintiff/respondent. The respondent submitted that the notice of appeal is defective because the appellant filed only one notice of appeal against the three decisions of the learned JC. He argued that this is non-compliance with the Rules of the Court of Appeal 1994 (COA Rules) and an abuse of process. He submitted the language of r. 17 of the COA Rules uses the words 'judgment, order or decision' in singular form; thus he said this suggests that the filing of one notice of appeal ought to be for one decision only. Similarly, he argued that O. 55 r. 3(1) of the ROC 2012 speaks of 'a notice of appeal against a decision'. Learned counsel further submitted that the rational for one notice of appeal for one decision is to separate each appeal instead of combining any two or more appeals into one to prevent ambiguity and uncertainty. He also argued that by combining three appeals into one notice of appeal as in the instant case, the appellant clustered all affidavits and exhibits in all three applications into one record of appeal thereby allowing it to pay one prescribed fee for the filing of the record of appeal and making it difficult to segregate which affidavit and/or which exhibit are for the hearing of encls. 13, 15 and 39.

[14] In our view the preliminary objection ought to be dismissed. In this case the non-compliance with the rules is only a technical non-compliance which does not cause any prejudice to the respondent. It is pertinent to note the three enclosures are related and they were heard together and disposed of at the same time by the learned JC. Moreover in the notice of appeal the appellant had clearly specified which and what decision is being appealed against. There is no ambiguity and the respondent is not misled. Under O. 2 r. 1(1) of the ROC the effect of non-compliance is only an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein. Foremost the court must consider the overriding interest of justice and not just the technical compliance of the rules. In this respect, it is noteworthy to bear in mind the provisions of O. 2 r. 1(2) and O. 2 r. 3 of the ROC 2012:

> Non-compliance with Rules (O. 2, r. 1)
>
> 1.(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been non-compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
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> (2) These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.

And

Preliminary objection for non-compliance of rules not allowed (O. 2, r. 3)

3. A Court or Judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any provision of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both.

[15] On the above consideration we disallowed the preliminary objection and proceeded to hear the appeal on its merits.

[16] On the dismissal of the defendant's application in encl. 39, we agree with the learned JC that a bankrupt has the capacity to affirm an affidavit for the purpose of court proceedings. The learned JC had accepted the explanation by the deponent of the plaintiff's affidavit, one Manjoor Sahid Maricar bin Mohamed Hussein that he was not aware of his bankruptcy and that is the reason why he did not disclose it in his affidavit. On the explanation given by the deponent, the learned JC concluded that the deponent 'had not wilfully withheld the information' (as to his bankruptcy) in his affidavits. The capacity and competency of a bankrupt to affirm an affidavit has already been settled by the Federal Court in the case of *Tong Soon Tiong & Ors v. FA Securities Sdn Bhd* [2013] 2 CLJ 448 cited and referred to by the learned JC in his judgment. Therefore we are of the opinion that there is no merit in the defendant's appeal against the dismissal of its application in encl. 39.

[17] With regard to the appeal against the learned JC's decision to allow the plaintiff's application in encls. 13 and 15, we heard the arguments on the two enclosures together as the learned JC did because they are interrelated. In his judgment the learned JC found the following uncontroverted facts:

[17] I will now take enclosures 13 and 15 together as they are somewhat interrelated. The following facts are uncontroverted, that is:

a. the plaintiff had completed the Works and handed over the site to the defendant and the buildings are now being used by the Ministry of Education;

b. the Certificate of Practical Completion was issued by the Superintending Officer on 30.5.2011 confirming that the whole of the Project works had been satisfactorily completed on 25.5.2011;

c. the Certificate of Practical Completion also states that the Defects Liability Period shall end on 26.5.2012; and

d. the Certificate of Making Good Defect was issued on 31.10.2012.

[18] In addition to the above uncontroverted facts, the defendant had also issued the final certificate of payment signed by one Hajah Norainiah A Rahman, the defendant's Managing Director. The same person is also one

of the two persons who had signed the LOA. The learned JC had examined the final certificate and it shows that the revised contract sum was RM11,409,105.24 and the amount paid under previous payment certificates totalling RM9,676,539.23; thus leaving a balance of RM1,732,566.01. This is the amount claimed by the plaintiff in his suit and O. 14 application against the defendant.

[19] The defendant however disputed the veracity of the final certificate of payment saying that it was not properly certified. The defendant argued the final payment certificate should be signed by the same two persons who signed the LOA ie, the Managing Director and the Project Manager. The learned JC had given his utmost consideration to this argument but found it untenable. We are of the view that he is right. The learned JC noted that the LOA is silent as to who is authorised to sign the certificate of final payment. The Managing Director was the highest executive officer of the defendant. Therefore she is clothed with authority to sign the final certificate. However the learned JC's finding is that at the material time the Managing Director had also taken on the role of the Project Manager because the Project Manager had resigned in October 2010. This fact was affirmed by one Mohd Adam bin Abd Aziz, the former Project Manager in his affidavit (encl. 42).

[20] In his submission learned counsel for the plaintiff also raised the issue that the plaintiff delayed in making the application in encl. 13. He cited the case of *Krishnamurthy Nagaratnam & Anor v. The Malayan Finance Corp Bhd* [1986] 1 CLJ 541; [1986] CLJ (Rep) 170; [1986] 2 MLJ 134 and argued that the application should have been filed before the defence is filed. In this case the plaintiff had filed the application after the filing of the defence; and there is no explanation of the delay. Again, in our view this is purely a technical argument that cannot nullify the plaintiff's application.

[21] Another argument raised by the defendant is that the plaintiff's application is premature because it was alleged that the plaintiff had not completed the works until the certificate of final approval is obtained from the Ministry of Education of Malaysia. This argument in our opinion is contrary to the available evidence before the court. The most material evidence being the certificate of final payment signed by none other than the Managing Director of the defendant who also had confirmed in her affidavit (encl. 20) that the sum owing to the plaintiff is RM1,732,566.01 and who had the ostensible authority to sign the certificate. The Federal Court in the case of *Voo Min En & Ors v. Leong Chung Fatt* [1982] 1 LNS 47; [1982] 2 MLJ 241, held that:

> … it is not enough for the respondent in answer to the appellants' application to sign final judgment, to raise an issue, or any issue. He must, however, raise such issue as would require a trial in order to determine it. In other words, the issue raised must be an arguable issue.

[22] In the case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400 at the Supreme Court, it was said that:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application.

[23] In the circumstances we see no merit in this appeal. There is no triable issue. Accordingly, it is dismissed with costs of RM10,000 to the respondent and deposit is to the respondent on account of costs.